

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: July 6, 2004

To: The Commission
(Meeting of July 8, 2004)

From: Alan LoFaso, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **SB 199 (Murray)** - Telecommunications: selling or licensing
lists of subscribers
As amended June 29, 2004

Legislative Subcommittee Recommendation: Support.

Summary: This bill would prohibit specified wireless providers from selling or licensing subscriber names and dialing numbers for inclusion in any directory without first obtaining the specified express consent of that subscriber.

Digest: Existing law, Cal. Const. art. I, sec. 1, provides *inter alia*, that Californians have an inalienable right to privacy.

Existing law, P.U. Code sec. 2891.1, prohibits a telephone or telegraph corporation from making available specified personal information of residential subscribers to any other person or corporation, without first obtaining the subscriber's written consent, except in specified circumstances, including information used for directories and directory assistance.

Existing law, P.U. Code sec. 2891.1, prohibits a telephone corporation selling or licensing lists of subscribers to include the telephone number of a residential subscriber's unlisted or unpublished number, except in specified circumstances including emergency and other public safety purposes.

This bill would prohibit providers of mobile telephony services from including subscribers' names and dialing numbers in any directory, unless the provider obtains a subscriber's express written consent in a specified format. This bill would further prohibit providers of mobile telephony services, or their direct or indirect agents or affiliates, from publishing or selling directory database information

This bill would establish the following express consent requirements for providers of mobile telephony services:

- (1) It shall be a separate document that is not attached to any other document.
- (2) It shall be signed and dated by the subscriber.
- (3) It shall be unambiguous, legible, and in a minimum 10-point type, and conspicuously disclose that, by signing, the subscriber is consenting to have the subscriber's dialing number sold or licensed as part of a list of subscribers and the subscriber's dialing number may be included in a publicly available directory.
- (4) If under the subscriber's calling plan the subscriber may be billed for receiving unsolicited calls or text messaging from a telemarketer, the provider's form shall include a disclosure, which shall be unambiguous, legible, and in 10-point type at a minimum, that by consenting to have the subscriber's dialing number sold or licensed as part of a list of subscribers or be included in a publicly available directory, the subscriber may incur additional charges for receiving unsolicited calls or text messages.

This bill would provide that no subscriber shall be charged for choosing not to be included in a mobile telephony provider's subscriber directory.

This bill would provide that its provisions are severable.

Analysis: The Cellular Industry Trade Association (CTIA), an association representing the wireless industry, is in the process of compiling the first wireless phone directory that may be available by the end of this year. The directory will only be accessible by dialing "411" (directory assistance) on a wireless phone. The directory will not be a printed document like the white pages and will also not be available via the Internet.

The directory will be comprised of subscriber information (name and dialing number) from almost all wireless providers except for Verizon Wireless. Although the Commission does not publish market share information specifically by provider, the largest wireless provider represents 28% of the total market share of the top wireless providers in terms of subscribership.¹ Therefore, over 70% of California wireless users would have their name and wireless telephone number included in the directory.

Proponents of the directory believe that the directory is a necessity because of the growing number of individuals that are canceling their home wireline phones and switching their existing dialing numbers to wireless phones. They also believe that many telemarketers are likely to refrain from soliciting these subscribers because they would not want to incur the expense of calling directory assistance to obtain customer information.

¹ California Public Utilities Commission, *The Status of Telecommunications Competition in California, Third Report For the Year 2003*, October 31, 2003, at p. 30.

Opponents of the directory believe that the directory would make available subscriber dialing numbers that were not before as readily available, causing these subscribers to be inundated with text-message spam and unwanted telemarketing calls. Given that most wireless plans charge subscribers for incoming calls and text messages, subscribers would have no choice but to bear the cost for answering these calls.

According to the Legal Division, the fundamental legal question raised by this bill is whether California can require wireless carriers to obtain informed, affirmative customer consent to the placement of the customer's name and wireless telephone number in a directory. In 1994, in a late amendment to the Budget Reconciliation Act, Congress included a provision in the Act pre-empting state authority over wireless carrier rates and market entry. As a consequence, the Commission no longer issues to wireless carriers certificates of public convenience and necessity, which authorize entry into the California telecommunications marketplace. In addition, the Commission does not review or set rates for wireless carriers.

The 1994 amendment to the Budget Reconciliation Act, however, did reserve to states authority over terms and conditions of wireless service. The bill's proposal to require customer consent before the customer's name and telephone number can be included in a published directory plainly links publication of the information to the fact that the customer has service with a wireless carrier. No rate or entry issue is implicated by this requirement. The bill does not run afoul of existing federal pre-emption of wireless rates and market entry.

However, the bill was lately amended to bar subscribers from being charged for choosing not to be included in the directory. The Legal Division believes this constitutes regulation of rates, and thus a matter that states would be preempted from prescribing under section 332(c) of the Telecom Act. The author is aware of the possibility of a pre-emption concern and has included a severability clause in the measure.

Related Legislation

U.S. Representative Joe Pitts (R-PA) has introduced H.R. 3558, a federal bill that would require cellular companies to have "clear preauthorization" from users before their names and phone numbers could be added to a directory. Senators Arlen Specter (R-PA) and Senator Michael DeWine (R-OH) have introduced companion bills on the Senate side. These bills are S. 1963 and S. 1973, respectively. None of these bills has been scheduled for mark-up in the subcommittees to which they have been assigned.

This bill mirrors AB 1733 introduced by Assembly Members Sarah Reyes (D-Fresno), John Campbell (R-Irvine), Lloyd Levine (D-Van Nuys), Barbara Matthews (D-Tracy), and others. This bill and AB 1733 are double-joined, requiring that both be enacted into law for one to have legal effect.

LEGISLATIVE HISTORY

Assembly U&C: 11-0 (Pass as amended) (6/24/04)

Assembly Jud: 11-0 (Pass) (6/22/04)

Senate Floor: 26-13 (Pass) (5/15/04)

Senate Jud: 5-1 (Pass) (5/6/03)

SUPPORT/OPPOSITION

Support: Consumer Action, Consumers Union, Office of Ratepayer Advocates, Privacy Rights Clearinghouse, Utility Consumers', Action Network, World Privacy Forum

Opposition: None on file.

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BILL LANGUAGE:

BILL NUMBER: SB 199 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY JUNE 29, 2004
AMENDED IN ASSEMBLY JUNE 10, 2004
AMENDED IN ASSEMBLY AUGUST 19, 2003
AMENDED IN SENATE APRIL 30, 2003

INTRODUCED BY Senator Murray

FEBRUARY 13, 2003

~~An act to add Article 9 (commencing with Section 17600) to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, relating to telephone solicitations. An act to amend Section 2891.1 of the Public Utilities Code, relating to telecommunications.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 199, as amended, Murray. ~~Wireless telephones:~~
~~directories~~ Telecommunications: selling or licensing
lists of subscribers .

Under existing law, the Federal Communications Commission licenses and partially regulates providers of commercial mobile radio service, including providers of cellular radiotelephone service, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR) services (collectively, mobile telephony service providers). Under existing law, no state or local government may regulate the entry of, or the rates charged by, any commercial mobile radio service, but is generally not prohibited from regulating the other terms and conditions of commercial mobile radio service.

Under existing law, the Public Utilities Commission has regulatory authority over public utilities, including telephone corporations. Existing law authorizes the commission to regulate telecommunications services and rates of telephone corporations, except to the extent regulation of commercial mobile radio service is preempted by federal regulation. Existing law prohibits a telephone corporation selling or licensing lists of residential subscribers, from including the telephone number of any subscriber assigned an unpublished or unlisted access number, as defined, without his or her written waiver of this protection, with specified exceptions.

This bill would prohibit a provider of mobile telephony services, as defined, providing the name and dialing number of a subscriber for inclusion in a directory, from including the dialing number of any subscriber without first obtaining the express consent of that subscriber. The bill would establish certain requirements for the provider's form for obtaining the subscriber's express consent. A subscriber would be permitted to revoke his or her consent to inclusion in a directory and would require that the mobile telephony services provider comply with the subscriber's request to opt out within 30 days. The bill would prohibit a provider of mobile telephony services or an affiliate or agent, from publishing any

directory database, or any portion or segment of a directory database. The bill would prohibit a provider of mobile telephony services or an affiliate or agent, from selling any directory database, or any portion or segment of a directory database, to a third party. The bill would create an exception from the above provisions for a telephone corporation transferring a customer's assigned telephone number to a new provider.

This bill would make the operation of its provisions contingent upon the enactment of AB 1733.

~~Existing law provides for the creation of a "do not call" registry by the Federal Trade Commission and prohibits telephone solicitors from calling a telephone number on that registry, subject to various exceptions.~~

~~This bill would provide that it is unlawful for a wireless telephone service provider, an agent of a wireless telephone service provider, or an association of telephone service providers to disclose the wireless telephone number of a subscriber without express prior consent. The bill would provide various remedies for violations of this provision.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

~~SECTION 1. Article 9 (commencing with Section 17600) is~~

SECTION 1. Section 2891.1 of the Public Utilities Code is amended to read:

2891.1. (a) Notwithstanding Section 2891, a telephone corporation selling or licensing lists of residential subscribers shall not include the telephone number of any subscriber assigned an unlisted or unpublished access number.

~~(b) A subscriber may waive all or part of the protection provided by this section subdivision through written notice to the telephone corporation.~~

~~(c)~~

(b) Notwithstanding Section 2891, a provider of mobile telephony services providing the name and dialing number of a subscriber for inclusion in any directory, shall not include the dialing number of any subscriber without first obtaining the express consent of that subscriber. The provider's form for obtaining the subscriber's express consent shall meet all of the following requirements:

(1) It shall be a separate document that is not attached to any other document.

(2) It shall be signed and dated by the subscriber.

(3) It shall be unambiguous, legible, and in a minimum 10-point type, and conspicuously disclose that, by signing, the subscriber is consenting to have the subscriber's dialing number sold or licensed as part of a list of subscribers and the subscriber's dialing number may be included in a publicly available directory.

(4) If under the subscriber's calling plan the subscriber may be billed for receiving unsolicited calls or text messaging from a telemarketer, the provider's form shall include a disclosure, which shall be unambiguous, legible, and in 10-point type at a minimum, that by consenting to have the subscriber's dialing number sold or licensed as part of a list of subscribers or be included in a publicly available directory, the subscriber may incur additional

charges for receiving unsolicited calls or text messages.

(c) A subscriber who provides express prior consent pursuant to subdivision (b) may revoke that consent at any time. A provider of mobile telephony services shall comply with the subscriber's request to opt out within 30 days.

(d) A subscriber shall not be charged for making the choice to not be listed in a directory.

(e) A provider of mobile telephony services, or any direct or indirect affiliate or agent of a provider, may not publish, in printed, electronic, or other form, the contents of any directory database, or any portion or segment thereof.

(f) A provider of mobile telephony services, or any direct or indirect affiliate or agent of a provider, may not sell to a third-party the contents of any directory database, or any portion or segment thereof.

(g) This section does not apply to the provision of telephone numbers to the following parties for the purposes indicated:

(1) To a collection agency, to the extent disclosures made by the agency are supervised by the commission, exclusively for the collection of unpaid debts.

(2) (A) To any law enforcement agency, fire protection agency, public health agency, public environmental health agency, city or county emergency services planning agency, or private for-profit agency operating under contract with, and at the direction of, one or more of these agencies, for the exclusive purpose of responding to a 911 call or communicating an imminent threat to life or property.

(B) Any information or records provided to a private for-profit agency pursuant to this subdivision shall be held in confidence by that agency and by any individual employed by or associated with that agency. This information or these records shall not be open to examination for any purpose not directly connected with the administration of the services specified in subdivision (e) of Section 2872 or this paragraph.

(3) To a lawful process issued under state or federal law.

(4) To a telephone corporation providing service between service areas for the provision to the subscriber of telephone service between service areas, or to third parties for the limited purpose of providing billing services.

(5) To a telephone corporation, to effectuate a customer's request to transfer the customer's assigned telephone number from the customer's existing provider of telecommunications services to a new provider of telecommunications services.

(6) To the commission pursuant to its jurisdiction and control over telephone and telegraph corporations.

~~—(d)—~~

(h) Every deliberate violation of this section is grounds for a civil suit by the aggrieved subscriber against the organization or corporation and its employees responsible for the violation.

~~—(e)—~~

(i) For purposes of this section, "unpublished or unlisted access number" means a telephone, telex, teletex, facsimile, computer modem, or any other code number that is assigned to a subscriber by a telephone or telegraph corporation for the receipt of communications initiated by other telephone or telegraph customers and that the subscriber has requested that the telephone or telegraph corporation keep in confidence.

~~—(f)—~~

(j) No telephone corporation, nor any official or employee

thereof, shall be subject to criminal or civil liability for the release of customer information as authorized by this section.

(k) The provisions of this section are severable. If any provision of this section or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application.

(l) For purposes of this section, "mobile telephony services" means commercially available interconnected mobile phone services that provide access to the Public Switched Telephone Network (PSTN) via mobile communication devices employing radio wave technology to transmit calls, including cellular radiotelephone, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR). "Mobile telephony services" do not include mobile satellite services or mobile data services used exclusively for the delivery of nonvoice information to a mobile device.

SEC. 2. This act shall become operative only if Assembly Bill 1733 of the 2003-04 Regular Session is enacted and becomes effective on or before January 1, 2005. ~~added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:~~

~~Article 9. Wireless Telephone Solicitations and Directories~~

~~17600. It is unlawful for a wireless telephone service provider, an agent of a wireless telephone service provider, or an association of telephone service providers to disclose the wireless telephone number of a subscriber without the express prior consent of the subscriber.~~

~~17601. (a) The Attorney General, a district attorney, or a city attorney may bring a civil action in any court of competent jurisdiction against a wireless telephone provider to enforce this article and to obtain any one or both of the following remedies:~~

~~(1) An order to enjoin the violation.~~

~~(2) A civil penalty of up to five hundred dollars (\$500) for the first violation and up to one thousand dollars (\$1,000) for a second and each subsequent violation.~~

~~(b) Any person whose wireless telephone number has been disclosed in violation of Section 17600 may bring a civil action for an injunction and may seek damages of up to one thousand dollars (\$1,000) for each violation.~~

~~17602. If any provision of this article or the application thereof to any person or circumstances is determined by a court to be invalid, that invalidity shall not affect other provisions or applications of this article that can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.~~